No. 11859

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

HOBART E. KEITH and LOUISE E. KEITH, his wife,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON SOUTHERN DIVISION

HONORABLE CHARLES H. LEAVY, *Judge*

BRIEF OF APPELLEES

A. J. HUTTON,
MARION GARLAND, JR.,
Attorneys for Appellees.

Office and Post Office Address:
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RESTATEMENT OF QUESTIONS PRESENTED

1. When a court makes a Findings of Fact and Conclusion of Law and enters his judgment, all of which hold in writing that the plaintiffs' damage is in the sum of $16,100.00, and on appeal the Transcript of Record does not contain any matters relating to the amount of damage suff-

ered, does the Circuit Court have sufficient facts with which to say the trial court erred in rendering the amount of damages?

2. Is a trial court bound by an oral amendment or decision, or is he at liberty at any time to change his ruling until such time as he enters Findings of Fact, Conclusions of Law and Judgment?

ADDITIONAL STATEMENT OF THE CASE

After three days of trial, the trial of this case was concluded September 19th, 1947. Thereafter, as customary, the judge discussed many of the points of fact and law concerned in the case in order to assist the attorneys in drawing the Findings of Fact, Conclusions of Law and Judgment, so they would be consistent with the court's opinion. Thereafter, the court signed Findings of Fact, Conclusion of Law and Judgment on the 6th day of October, 1947, and that said Findings of Fact pertinent to this appeal are as follows:

> "That as a direct result of said striking of the plaintiffs' car by the defendant's car as above set forth, the plaintiffs' car and personal effects were damaged in the total sum of seven hundred and fifty ($750.00) dollars; that the plaintiff, Hobart E. Keith's left arm was mangled causing him damage in the further and following amounts: Loss of earnings on behalf of the defendant, Hobart E. Keith, both past and future, in the sum of five thousand ($5000.00) dollars (said $5000.00 exclusive of compensation due plaintiff for other United States services); the said Hobart E. Keith will need medical care, which he cannot receive from the United States Government under any of his present preferences,

in the sum of seven hundred fifty ($750.00) dollars and that the defendants are further damaged in general damages for shock, pain, embarrassment, suffering, disfigurement, maiming and all other injury in the sum of nine thousand, six hundred ($9,600.00) dollars or in a total amount of sixteen thousand, one hundred ($16,100.00) dollars." (Tr. 22.)

On the same date appropriate Conclusions of Law were drawn, as follows:

"That the defendant, United States of America, has damaged the plaintiffs in the sum of sixteen thousand, one hundred ($16,100.00) dollars for which the plaintiffs are entitled to judgment, together with Court costs, as provided by law." (Tr. 23.)

Judgment was entered consistent with said Findings of Fact and Conclusions of Law, the appropriate part of which is as follows:

"Ordered, Adjudged and Decreed that the plaintiffs have judgment against the defendant, United States of America, in the sum of Sixteen Thousand, One Hundred ($16,100.00) Dollars, together with costs, as provided by law, in the sum of $62.80, making a total judgment in the sum of $16,162.80." (Tr. 24 and 25.)

ARGUMENT IN SUPPORT OF TRIAL COURT'S DECISION

The only question possible to appeal here is whether or not the trial court had a proper mental process in making his Findings of Fact, Conclusions of Law and Judgment. There can be no question raised but that his ultimate result

of the amount of damages was correct as the Findings of Fact and Conclusions of Law supported the judgment.

That the plaintiff in this case was actually damaged in the sum of $16,100.00 is not questioned by the appellant, who must conclude that the damages in the sum of $16,-100.00 are reasonable. It is axiomatic that if the damages are reasonable, the court's so determining them as being reasonable is the proper thing for the court to do.

ARGUMENT IN ANSWER TO ARGUMENT OF APPELLANT

The answer to the statement of points of the appellant that

> "the District Court, in rendering judgment for plaintiffs, erred in allowing attorneys' fees in addition to an award of damages and in entering judgment in the aggregate amount including the allowance for attorneys' fees"

is very simple. The answer is that the court did not do this. The court very definitely made a Findings of Fact (Tr. 22) that the appellee was damaged in the sum of $16,100.00, and did not enter any aggregate judgment including attorneys' fees, but the judgment itself specifically provides the attorneys' fees shall come out of the award to the defendant.

> "It is further
>
> "Ordered, Adjudged and Decreed that the plaintiffs' attorneys, A. J. Hutton and Marion Garland, Jr., receive from the plaintiffs the sum of fifteen per cent (15%) of their total judgment as attorney's fees, or the

> sum of Two Thousand, Four Hundred and Fifteen ($2,415.00) Dollars; same to be paid from the moneys received on this judgment." (Tr. 25.)

In other words, the appellant has raised questions which in truth and in fact do not exist.

In our opinion, the question that actually was in the appellant's mind should be as follows:

If a judge of the Federal Court, under a misapprehension of the law of the case, makes an oral statement from the bench in rendering his opinion, and said misapprehension is called to his attention, can he then change his opinion to conform to the law, and incorporate in his final decision his true findings, all in accordance with the law?

Appellants answer this in the negative.

If the appellant's argument is sound, the court would have to be most careful in what he said during or after a trial, before signing the judgment. If he spoke out of turn or by mistake, he would have no way out, and errors could never be corrected.

The Federal Judge who tried this case recognized the soundness of this argument. See Appellant's Brief, last paragraph, page 5, extending onto page 6.

The case of *Viner v. Untrecht*, 158 P. (2d) 3, cited on page 10 of appellant's brief, is where the court allowed attorneys' fees in excess of the judgment to the defendant. That is not so in the case at bar. The case of *Insuranshares Corporation v. Northern Fiscal Corporation*, 42 F. Supp. 126, is likewise not in point.

In the case of the *Union Indemnity Co. v. Vetter*, 40 F. (2d) 606, cited on page 11 of the appellant's brief, is not in point, as the attorneys' fees there were not allowable as an element of damage and were held to be one of the elements of damage. In the case at bar it is found that the plaintiff's damage is so much and the attorneys' fees are not an element of that damage.

The question is not raised here, but that 15% for attorneys' fees is a reasonable sum to allow the attorneys.

The rest of the cases cited in the brief are for the same reasons not in point.

The only facts properly before this court at the present time is the form of Findings of Fact and Conclusions of Law presented by the court. The case of *Meyer v. Everett Pulp & Paper Co.*, 193 Fed. 857, at page 863, sets out the law very concisely that the decision of the judge as to amount will not be upset unless there is before the court some evidence to show the amount was excessive:

> "The general conclusion that the plaintiffs should take nothing except the money deposited is tantamount to a general verdict of a jury, and we are not permitted to look into the evidence for determining whether the conclusion was properly deduced.
>
> "We could not do so even if it were proper, because the record does not contain all the evidence adduced at the trial. Nor can the written opinion of the court be considered as a findings of facts. It shows the conclusion of the judge upon the facts and the law, but it cannot be treated as a finding of conclusions of either fact or law."

That a court is not bound by its reasoning if its judgment is upheld by the facts is axiomatic. The case of *Interstate Circuit, Inc., v. United States*, 304 U. S. 55, 82 Law Ed. 1146, states the law as follows:

> "The opinion of the court was not a substitute for the required findings. A discussion of portions of the evidence and the court's reasoning in its opinion do not constitute the special and formal findings by which it is the duty of the court appropriately and specifically to determine all the issues which the case presents. This is an essential aid to the appellate court in reviewing an equity case (*Railroad Commission v. Maxcy*, 281 U. S. 82, 74 L. Ed. 717, 50 S. Ct. 228) * * *."

The rule is set out in 53 *Am. Jur.* 784, paragraph 1129, as follows:

> "* * * The decision of the court is its judgment, while its opinion consists of and represents the reasons given for, or the grounds of, the decision and judgment. Such reasons are no essential part of the decision, *and in the eyes of the reviewing court they are not material if the decision itself is proper.* It is universally recognized that a correct decision will not be disturbed even though it is based on improper grounds. *Neither does the court's opinion, giving the reasons for its decision*, operate as findings of fact by the court. * * * But in reviewing a judgment, an appellate court will examine the lower court's opinion only for the purpose of ascertaining the arguments made and the reasons given in support of the lower court's rulings and determinations.
>
> "The court has been held free to change is decision, orally announced, on the merits before judgment has been entered thereon." (*Italics ours.*)

In *Ritter v. Johnson*, 163 Wash. 153, 300 Pac. 518, the

court very ably and simply takes care of the same question as here raised. Quoting from 163 Wash. 155 and 156:

> "Appellant first contends that the court erred in entering judgment in respondents' favor, having once orally announced a decision in appellant's favor to the effect that the action would be dismissed. No judgment having been entered, the court was at liberty to change its ruling, and no error can here be predicated upon the fact that such change was made. *Landry v. Seattle, P. A. & W. R. Co.*, 100 Wash. 453, 171 Pac. 231; *Quigley v. Barash*, 135 Wash. 338, 237 Pac. 732."

It is therefore concluded by the appellees that the court did not allow attorneys' fees in excess of the amount of damages awarded the appellees and that the question of whether or not the attorneys' fees of 15% are reasonable is answered by the statute itself, which allows attorney fees up to 20%. And the question of whether or not the damages allowed were excessive is precluded by the fact that the appellant did not certify to this court in the transcript a statement of those facts upon which the damage was based.

CONCLUSION

It is respectfully submitted the trial court should be affirmed and the appellees should be given their costs upon this appeal as provided by law.

Respectfully submitted,

A. J. HUTTON,
MARION GARLAND, JR.,
Attorneys for Appellees.